FILE COPY

IN THE

Supreme Court of the United States

No. 89

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, Appellant

v.

OSSIE McCRAY, Appellee

BRIEF OF APPELLANT, LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE

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I.

THE OPINION OF THE COURT BELOW

The opinion in the Arkansas Supreme Court has not been officially reported, but is copied in full in the record pages 16-19 inclusive.

II.

JURISDICTION

The statement of jurisdiction as required by paragraph 1 of Rule 12 of the Supreme Court of the United States, has heretofore been filed and printed, and reference is here made to it as fully as if it were herein copied in full.

III.

STATEMENT OF CASE

This is a suit on an insurance policy for Five Hundred (500) Dollars, and the judgment in the Supreme Court of Arkansas was for Seven Hundred Ninety and 45/100

(790.45) Dollars, which included an item of Sixty (60) Dollars, being 12% of the amount of the policy, and Two Hundred (200) Dollars attorney's fees assessed by the lower court and affirmed by the Supreme Court under Section 6155 of Crawford and Moses' Digest of Arkansas hereinafter copied in full, the other items being for interest and court costs.

The policy was upon the life of one Jonas McCray, who committed suicide on May 10, 1932, (Record, page 12) and appears in full on pages 4a, 4b, 4c, and 4d of the transcript.

The policy was dated November 3, 1930, and lapsed for non-payment of premium on May 1, 1931, (Record, page 11) and was reinstated on July 15, 1931, (Record, page 12) the said death being within one year from the date of reinstatement.

The following provision of the policy presents the matter in controversy:

> "If within one year from the date of issue of this policy, the insured shall, whether sane or insane, die by his own hand, the liability of the company shall be limited to the amount of the premiums paid hereon." (Record, page 12).

The contention of appellee as made in the Declaration was that the reinstatement of the policy continued it in force as an existing policy and that the above clause related back to the date of the policy itself, and that the death of the assured being more than one year from the date of the policy, to-wit: November 3, 1930, the suicide under the terms of the policy did not void it. The contention made by the appellant in its answer and pleadings was that when the policy lapsed on July 15, 1931, it was a complete termination of the relationship of the Company and the assured

and beneficiary; that upon its reinstatement on July 15, 1931, it became a new contract, as if then first written, and the above suicide clause began to run anew, and that the death of the assured within one year from the date of the reinstatement voided the policy. The question, therefore, upon which the liability of the appellant depended, was whether or not the suicide clause began to run from the date of the reinstatement on July 15, 1931, or whether it began to run from the date of the policy, November 3, 1930. Inasmuch as it is stipulated that the assured committed suicide on the 10th day of May, 1932, if the suicide clause began to run from the date of the policy, November 3, 1930, the appellant was liable, but if it began to run from the date of the reinstatement on July 15, 1931, the appellant was not liable.

The Circuit Court held appellant liable, and this judgment was affirmed by the Arkansas Supreme Court. Appeal to this Court was prayed and was refused by the Arkansas Chief Justice, but was granted by Mr. Justice Butler of the Supreme Court of the United States.

IV.

SPECIFICATIONS OF ERRORS

1. There is no evidence in the record to support the judgment of the Supreme Court of Arkansas in assessing the penalty of twelve (12) per cent and Two Hundred (200) Dollars attorney's fees under the above Arkansas Statute, appellant having acted in good faith in refusing to pay and in defending the case.

2. The Supreme Court of the State of Arkansas erred in holding that the above Statute of Arkansas was constitu-

tional and could be applied to cases involving no bad faith in the refusal to pay or in the defense of the suit, and that it did not violate either Article 1, Section 10, of the Federal Constitution forbidding a State to pass laws impairing the obligations of contracts, or the Fourteenth Amendment of that Constitution forbidding the taking of property without due process of law, both of said provisions of the Federal Constitution forbidding a State to pass a law assessing penalties against insurance companies simply because such companies may not be successful in defending suits, and without reference to the lack of its good faith in refusal to pay and in defending such suits.

3. The Supreme Court of the State of Arkansas erred in assessing any judgment against appellant for the reason that appellant is a Tennessee Corporation, and prior to the time the policy was issued the Supreme Court of Tennessee in the case of *Insurance Company* v. *Galbraith*, 115 Tenn. 466, had held that, where a policy lapsed and was reinstated, the date of the reinstatement became the date of the policy and all of its provisions began to run anew, and the suicide of the assured being within one year from the date of the reinstatement, there could be no recovery; and this policy, being issued by a Tennessee Corporation, the interpretation of the Supreme Court of Tennessee on the question became a part of the policy to the same extent as if written therein, and the judgment of the Supreme Court of Arkansas holding to the contrary is a violation of Article 1, Section 10, of the Federal Constitution forbidding the impairment by a State of the obligations of contracts and of the Fourteenth Amendment of the Federal Constitution forbidding the taking of property without due process of law in that such judgment failed to give appellant the benefit of a contract which was plain and unambiguous.

4. The judgment of the Supreme Court of Arkansas in this case violates the Constitution of the United States in the following particulars:

(1) Article 4, Section 1:

> "Section 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

Section 6132 of the Code of Tennessee for 1932 expressly provides that appellant shall not discriminate between policy holders and the interpretation of the contract in this case by the Arkansas Supreme Court compels this company to pay a claim in Arkansas that it is expressly forbidden to pay in Tennessee, both by the above Section of Tennessee Code and Section 322 of the Digest of Insurance Laws of Arkansas, being Section 10 of Act 493 of 1921, and, in violation of both statutes, to make the same identical contract with the same identical words mean one thing in Tennessee and another in Arkansas. Appellant had a vested right not only in this contract as construed under Tennessee law which it was compelled under the Tennessee anti-discrimination law to apply equally among insurants, but it also had a vested right in the said Arkansas anti-discrimination law, in that the Supreme Court of Arkansas could not constitutionally compel it to do a thing which under the Arkansas statute, subjected it to severe fines, and made mandatory the cancellation of its right to do business in that State. Also the decision in *Galbraith* v. *Insurance Co.*, 115 Tenn. 477, holding that under the language of this particular policy, it began to run anew from the date of the reinstatement, constitutes a judicial proceeding, which became

a part of the contract itself, as has been before stated. Accordingly, the Supreme Court of Arkansas did not follow either the Public Acts or the judicial proceedings of the State of Tennessee in this matter, nor give "full faith and credit" to either.

(2) The interpretation of the Tennessee Supreme Court in *Galbraith* v. *Insurance Company*, supra, became a part of this policy and this later decision and judgment of the Arkansas Supreme Court giving the contract an entirely different meaning constitutes a "subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution and is therefore void", as was held in *Edwards* v. *Kearzey*, 96 U. S., 595, 607 (24:793, 798).

Section 10, Subsection 1, of the Federal Constitution provides: "No State" shall make a law impairing the obligation of contracts and the Fourteenth Amendment expressly prohibits "any state" from taking property without due process of law. The word "State" includes both the Legislative and Judicial Departments.

A judgment of a Court may violate the Constitution in the same manner as the Act of the Legislature.

The above specification of errors are identical with the statement of the points upon which appellant gave notice that it intended to rely in this Court (p. 30-33 inclusive).

V.

ARGUMENT
SUMMARY OF ARGUMENT

Point A

Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas is unconstitutional in toto under the Due Process Clause of the Fourteenth Amendment and of Article 1 Section 10 of the Federal Constitution, forbidding the impairment of the obligations of contract by a State, or, if not in toto, then it is unconstitutional when applied to a case where there is no evidence of bad faith in refusing to pay the claim and resisting it in Court.

Point B

Prior to the issuance of the Policy, the Tennessee Supreme Court in *Insurance Company* v. *Galbraith,* 115 Tenn. 471, had held that a lapsed policy when renewed became a new contract from the date of the reinstatement, and this decision as applied to a policy issued thereafter became a part of the policy contract to the same extent as if written in full therein.

Point C

Section 6132 of Tennessee Code and Section 322 of the Insurance Laws of Arkansas both make it unlawful for appellant to pay an Arkansas policyholder where a Tennessee policyholder is denied the right to recover under the same facts and the same policy, and consequently the judgment of the Supreme Court of Arkansas is unconstitutional under Article 4, Section 1 of the Constitution of the United States in that said judgment denies appellant

full faith and credit to public acts, records and judicial proceedings of every other State, under Article 4, Section 1 of the Federal Constitution.

Point D.

The judgment of the Supreme Court of Arkansas in this case compels the appellant to pay a judgment which under like circumstances could not be rendered for or paid to a citizen of Tennessee, constituting an unlawful discrimination under Section 6132 of the Code of Tennessee for 1932, and Section 322 of the Digest of Insurance Laws of Arkansas, being Section 10 of Act 493 of 1921, subjecting appellant to the penalties of the Statutes of both States, which impose fines and the penalty of cancellation of its license and a refusal to renew its license under such circumstances, and such judgment is unconstitutional under the Due Process Clause of the Fourteenth Amendment as taking property without due process of law.

Point A

Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas is unconstitutional in toto under the Due Process Clause of the Fourteenth Amendment and of Article 1, Section 10, of the Federal Constitution, forbidding the impairment of the obligations of contract by a State, or, if not in toto, then it is unconstitutional when applied to a case where there is no evidence of bad faith in refusing to pay the claim and resisting it in Court.

This Court had before it, in the case of *Supreme Ruling of the Mystic Circle* v. *Snyder*, 227 U. S., 500, 57 L. Ed., 614, the exact question presented in this case. The Tennessee statute provided a penalty against insurance companies where the failure to pay was in bad faith, and, notwithstanding this provision, it was contended that the effect of the Tennessee statute was to penalize insurance companies merely because a judgment might be rendered against them. To show that this Court understood the contention as we have thus stated it, we quote the following:

> "But we are asked to look behind the language of the statute and to assume that its effect is to impose the additional liability in the *absence of bad faith*. That is, we are to take the statute as including what it expressly excludes—as allowing what it explicitly denies. The act does not make the *mere refusal to pay* sufficient evidence of bad faith, so as to justify the added recovery; it requires that the *bad faith be shown*, and that the *consequent additional loss be shown*. And the State Court so construed the statute in the application that was made of it in the present case."

In order to show that the Court in the above case consid-

ered the very point presented in this case, we quote the following:

> "The statute is aimed, not at the rights secured by the contract, but at *dishonest methods* employed to defeat them. The additional liability is attached to *bad faith alone*. This is the necessary effect of the proviso. It is only when it is 'made to appear to the Court or jury trying the case that the refusal to pay said loss was *not in good faith*' that the added recovery may be had. It must also appear that such refusal *inflicted* '*additional expense, loss, or injury*' upon the policyholder, and it is this *further expense, loss or injury* that *measures* the amount to be allowed, which is not to exceed 25 per cent of the liability on the policy.
>
> "It cannot be said that this effort to give indemnity for the *injuries* which would be *sustained* through *perverse methods* and through an *abuse* of the *privileges accorded to honest litigants* imposed a burden upon the enforcement of the contract. Neither the contract nor the existing law which entered into it contemplated contests *promoted in bad faith*, or justified the *infliction of loss* by such means. The State was entitled at all times to take proper measures to prevent the *perversion* of its *legal machinery*, and there was no denial or burdening, in any proper sense, of the existing remedies applicable to the contract by the demand that they be *availed of bona fide*."

This Court also had this question before it as applied to the right to resort to Federal Courts in the cases of *Terral* v. *Burke Construction Company*, 257 U. S. 529, 66 L. Ed. 352, and *Mortensen* v. *Security Insurance Company*, Adv. Sheets, Vol. 77, No. 11, 673.

In *Terral* v. *Burke Construction Company*, supra, this Court held that a legislative act denying to a foreign corporation, under the penalty of the cancellation of its license,

the right to resort to a Federal Court or to remove a case to a Federal Court was unconstitutional.

In *Mortensen* v. *Security Insurance Company*, supra, this Court applied this same principle of law to a State anti-removal statute as applied to a foreign insurance company and held the statute unconstitutional.

These two last cases clearly hold that a State statute having for its object the denial of the right to a litigant to resort to a Federal Court is unconstitutional under the Fourteenth Amendment, and likewise for the same reasons, it is clear that the same rules of law would apply to the right of a citizen to apply to State Courts either in the assertion of or in the defense of any right which it, in good faith believes, constitutes a good cause of action or a good defense.

This is the view taken of this Arkansas penalty Statute by the United States Circuit Court of Appeals of the Eighth Circuit in the cases of *Standard Accident Insurance Company* v. *Rossi*, 35 F. (2) 667, and *Intersouthern Life Insurance Company* v. *McElroy*, 38 Fed. (2) 557, in which the Court expressed the opinion that this penalty statute was unconstitutional when applied to cases where the refusal to pay or the defense of the suit was not in bad faith. Showing that the Arkansas Supreme Court recognized the law on this question as laid down by the United States Circuit Court of Appeals for the Eighth Circuit, the following is copied from its opinion in the present case, Record, page 19:

> " * * * assuming appellant defended in good faith, this does not excuse it from the plain provisions of the statute. *Security Ins. Co.* v. *Smith*, 183 Ark. 254, 35 S. W. (2d) 581; *Mut. Life Ins. Co.* v. *Marsh*, 185 Ark. 332, 47 S. W. (2d) 585, *where we expressly refused to follow the Circuit Court of Appeals in Standard Acc. Ins. Co.* v. *Rossi*, 35 Fed. (2d) 667, and *Inter-*

Southern Life Ins. Co. v. *McElroy*, 38 Fed. (2d) 557. This question is now settled and we decline to reconsider the matter."

We, therefore, submit that this penalty statute of Arkansas is unconstitutional in toto because it makes no provision for excepting those cases where the refusal to pay the claim or the defense of the suit was not in bad faith; if not in toto, then it is unconstitutional as applied to a case showing no evidence of bad faith in refusing to pay the claim or in resisting its payment in Court.

The appellee in its brief, submitted in support of its motion to dismiss this appeal, relied upon the cases of *Fidelity Mutual Life* v. *Mettler*, 185 U. S. 308, *Iowa Life* v. *Lewis*, 187 U. S. 335, *Home Life* v. *Fisher*, 188 U. S. 528, and *Farmers and Merchants Insurance Company* v. *Dobney*, 189 U. S. 301. None of these cases considered the questions here involved, but were decided upon two other questions:

1. That a State has the right to prescribe whatever conditions it may deem proper as a condition precedent to a corporation of another State entering the State to do business; and,

2. That the placing of a penalty upon insurance companies and no other class of corporations was a class distinction forbidden by the Federal Constitution.

In the case of *Security Mutual Life* v. *Pruitt*, 202 U. S. 264, 50 L. Ed., 1013, this Court held that a State had the right to prescribe as a condition precedent to its admission into the State that it would not remove a case from the State to the Federal Court, but in *Terral* v. *Burke Construction Company*, 257 U. S., 529, 66 L. Ed., 352, this Court reversed that ruling, and held that the right of corporations

to resort to a Federal Court could not be abridged by a State statute on the ground that it was a condition precedent to admission to the State. In *Mortensen* v. *Security Insurance Company*, decided on March 27, 1933, Advance Sheets, Vol. 77, No. 11, page 673, this Court expressly held that a State could not prescribe as a condition precedent to admission to the State the condition that an insurance company should not remove a case from a State to a Federal Court.

We, therefore, submit that the above cases relied upon by appellee are no longer applicable so far as relates to the right of an insurance company to resort to any Court in order to defend a suit in good faith.

Likewise, the case of *Zioux County* v. *National Surety Co.*, 276 U. S. 239, 72 L. Ed. 549, likewise relied upon by appellee, has no bearing upon the contention here made. That case related to the right of the attorneys for the county to have taxed as cost an attorneys' fee, as authorized by Section 6193 of the Nebr. Comp. Stat. The United States Circuit Court of Appeals for the Eighth Circuit held that, inasmuch as Rev. Stat., Sec. 823 and 824 provided *what costs* should be taxed against litigants in the Federal Court, a State statute in reference to costs would have no application. This Court reversed the Court of Appeals on this point. However, the following shows that we have correctly stated the point upon which the Court decided the case:

> "In striking down so much of the judgment as allowed an attorney's fee the Court below was persuaded that Sec. 7811, which provides for an attorney's fee, authorized it only as costs to be taxed in the State Court. As costs in the Federal Courts are regulated exclusively by Rev. Stat., Sec. 823 and 824, the Court concluded that other costs authorized only by a State statute, could not be included in the judgment."

It will thus be seen that this Court in none of the cases mentioned above, relied upon by appellee, considered or decided the point that a State statute could not authorize the assessment of penalties or attorney's fees against an insurance company merely because a judgment might be rendered against it, and without reference to its bad faith in denying payment of the claim and resisting suit in Court.

When we consider that it is only by executions and other processes of Courts that property may be taken, it ought to be clear that the right to resort to Courts honestly and in good faith is the very essence of the Fourteenth Amendment. By a long line of judicial decisions, the maxim of law has been thoroughly established that the right to tax or the right to regulate is the right to destroy, and, accordingly, if a State Legislature may impose a penalty merely because a judgment is rendered against an insurance company, it could go further and deny such company the right to resort to Courts at all either in the assertion or defense of its rights. If this could be done, the Fourteenth Amendment would be a useless scrap of paper.

Prior to the present case, the Supreme Court of Arkansas had not decided the question of whether or not a lapsed policy began to run anew from the time of the reinstatement as was held by the Tennessee Supreme Court in *Galbraith* v. *Insurance Company*, supra. The appellee contended below in his brief in support of his motion to dismiss this appeal that the cases of *New York Life Insurance Company* v. *Adams*, 151 Ark. 123, *Sec. Life* v. *Leeper*, 171 Ark. 77, and *Equitable Life* v. *King*, 178 Ark. 293, did in fact decide this question adversely to the contentions of appellant; that is, it held that a lapsed policy when reinstated did not begin to run anew from the date of the reinstatement.

The question in those cases was whether or not after a policy had lapsed, the company could impose any *new conditions* as a condition precedent to reinstatement. The points here involved were not discussed at all, that is, the meaning of the terms of the original policy construed in the *light of Tennessee decisions*, and especially in reference to the said anti-discrimination statutes of Tennessee and Arkansas. Accordingly, it is clear that the point involved in this suit had not prior to the present case been decided by the Supreme Court of Arkansas.

Point B

Prior to the issuance of the policy, the Tennessee Supreme Court in *Insurance Company* v. *Galbraith*, 115 Tenn. 471, had held that a lapsed policy when renewed became a new contract from the date of the reinstatement, and this decision as applied to a policy issued thereafter became a part of the policy contract to the same extent as if written in full therein.

In *Insurance Company* v. *Galbraith*, supra, the Tennessee Supreme Court said:

> "It is well settled that a policy is forfeited by its terms if the premium (or any note given for it) is not paid at maturity. *Thompson* v. *Life Ins. Co.*, 104 U. S., 252, 86 L. Ed., 765; *Ressler* v. *Life Insurance Company*, 110 Tenn., 411, 75 S. W., 735.
>
> "The effect of nonpayment of the premium is made clear by the policy itself. As is said in *Lantz* v. *Insurance Co.*, 139 Pa., 546, 21 Atl., 81, 10 L. R. A., 577, 23 Am. St. Rep., 202: 'It declares that, if not paid on the days named and in the lifetime of the insured, the policy shall cease and determine. . . . It ceases to bind the company and to protect the assured, and this without any act or declaration on the part of the former. It

does not require a formal forfeiture. . . . As to him (the assured) it is a dead policy. It is true that it may be restored to life by the subsequent payment of the premium and its acceptance by the company. This, however, is a new contract, by which the company agrees in consideration of the premium to continue in force a policy which had previously expired; in other words, it is a new assurance, though under the former policy.'

"This it seems to us, is a clear statement of the want of relationship of the parties during the lapse of a policy like the one in question; and of the character of the new relations which grow out of its reinstatement. While in a state of absolute collapse, the former owner of the policy has neither a legal nor an equitable claim on the company. By his failure to comply with the conditions upon which it could be kept alive he has *ipso facto* forfeited all rights under the policy. As to him, it is as if it had never been written. If any benefit is to accrue to him therefrom, it must be revitalized, and this can only be done with the consent of the company. When it is done, then it becomes a new assurance—a new contract—as if the policy then was for the first time issued. If this be its nature, then it must operate in the future from the date of its reinstatement, and whatever might be its original date, or howsoever long it may have run, yet it would seem, by the force of necessary logic, to follow that the incontestable clause would begin its new life with the date of the new contract. And it would seem also to be as certainly true that if the assured obtained the reinstatement by fraud, or by false warranties material to the risk, during the period reserved for contest, the company should be allowed to protect itself against such unfair dealing.

"In *Bottomley* v. *Insurance Company*, 170 Mass., 274, 49 N. E., 438, it is said that a revived policy of life insurance does not go into effect if a declaration or warranty contained in the application therefor is un-

true. This statement, however, must be taken with the modification that if the policy contains a time limit, beyond which it is incontestable, when that limit is passed, then, unless fraud is within the class excepted from the operation of the clause fixing the limit, it is no longer a defense, but the policy is then affected notwithstanding the fraud."

The law is well settled that, where the language of an insurance policy has been construed by the Supreme Court of the Home State of the corporation, the *interpretation* placed by that Court upon such language becomes as much a *part of the policy* as if it were expressly *set out therein*, as held by the following cases:

Armour Packing Co. v. *U. S.*, 82, C. C. A., 135, 153 F. 1, Eighth Circuit, 14 L. R. A. (N. S.), 415:

"But the contention that the contract was valid, and that its performance was enforceable after the higher rates were filed and published, ignores a basic rule of the interpretation of agreements and *material* part of the contract That rule is that *all laws* in existence when an *agreement is made* necessarily *enter into and form* a part of it as fully as if they were *expressly referred to or incorporated into its terms. Von Hoffman* v. *Quincy* (*United States ex. rel. Von Hoffman* v. *Quincy*), 4 Wall., 535, 550, 18 L. Ed., 403, 408; *Rees* v. *Watertown*, 19 Wall., 107, 121, 22 L. Ed., 72, 76; *Edwards* v. *Kearzey*, 96 U. S., 595, 601, 24 L. Ed., 793, 796; *Seibert* v. *Lewis* (*Seibert* v. *United States*), 122 U. S., 284, 295, 30 L. Ed., 1161, 1165, 7 Sup. Ct. Rep., 1190; *Southern R. Co.* v. *Bouknight*, 30 L. R. A., 823, 17 C. C. A., 181, 185, 25 U. S., App., 415, 70 Fed., 442, 446."

Seibert v. *U. S.*, 122 U. S., 284, 30 L. Ed., 1165:

"It is well settled by the decisions of this Court that

> 'The remedy subsisting in a State, when and where the contract is made and is to be performed, is a *part of its obligation*, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution and is therefore void.' *Edwards* v. *Kearzey*, 96 U. S., 595, 607 (24: 793, 798)."

Therefore, as to all Tennessee policy holders under policies issued after the above decision, the policy began to run anew from the date of the reinstatement, and where death by suicide occurred within one year from said date, there could be no recovery, for the reason that the decision in the Galbraith case became a part of each policy issued thereafter to the same extent as if copied in full therein.

Point C

Section 6132 of Tennessee Code and Section 322 of the Insurance Laws of Arkansas both make it unlawful for appellant to pay an Arkansas policy holder where a Tennessee policy holder is denied the right to recover under the same facts and the same policy, and consequently the judgment of the Supreme Court of Arkansas is unconstitutional under Article 4, Section 1, of the Constitution of the United States in that said judgment denies appellant full faith and credit to public acts, records and judicial proceedings or every other State.

Section 6132 of the Tennessee Code of 1932 provides:

> "No Discriminations in Favor of Insurants Allowed; Contract to Be Expressed in Policy.—No life insurance company doing business in Tennessee shall make or permit any distinction or discrimination between insurants of the same class and equal expectation of life

in the amount or payment of premiums, or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes; nor shall any such company, or any agent thereof, make any contract of insurance or agreement as to such contract other than is plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow, as an inducement to insurance, any rebate of premiums payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy contract of insurance."

Therefore, as to Tennessee policyholders, there could be no recovery under the facts of the present case; for the reason that the suicide occurred within one year from the date of the reinstatement, and, if the Company had paid this claim to a citizen of Arkansas on the theory that the suicide clause began to run from the date of the policy, and not from the date of the reinstatement, a discrimination against Tennessee policyholders would result, and appellant would clearly be in violation of the above Tennessee statute and be liable to fine and to have its license revoked.

Section 322 of the Digest of Insurance Laws of Arkansas, being Sec. 10 of the Act 493 of 1921, is as follows:

"It shall be unlawful for any life insurance company doing business in this State to *permit distinction or discrimination* between *individuals of the same class or of equal expectation of life* in the amount of payment of *premiums, rates, dividends, benefits, terms* or *conditions* of contracts of life or endowment insurance; nor shall any life insurance company, or agent thereof, make any contract except as is plainly expressed in the policy of insurance; nor shall any life insurance com-

pany, officer or agent thereof, pay, offer to pay, directly or indirectly, as an inducement to insurance, any rebate of premiums on the policy of insurance, or any other thing of value whatsoever not specified in the policy contract. Any company or agent violating the provisions of this Section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and the Commissioner shall cancel the right of the company, or agents convicted, to transact business in this State for a period of one year. Provided, the company shall not be held liable under this Section for any act of its agents unless such act was authorized by one of its officers, State managers, State or general agents.—Sec. 10, Act 493, of 1921."

It will be noted that the Tennessee and Arkansas statutes above quoted are in almost identical language, both expressly prohibiting under extreme penalties, appellant from *discriminating between policyholders*. It will also be noted that the prohibition under the Arkansas statute does not limit this discrimination to *Arkansas policyholders*, but to policyholders in general. Accordingly had appellant paid the present claim, it, as aforesaid, would have been a discrimination against Tennessee policyholders, and it would have violated both the Tennessee and Arkansas statutes.

In other words, the same identical contract with the same identical words would mean one thing in Tennessee and another in Arkansas, which necessarily means that the Arkansas policyholder would be paid a claim denied to the Tennessee policyholder, thus presenting a clear case of discrimination.

By paying this claim, thus discriminating against Tennessee policyholders and violating both of the said anti-

discrimination statutes of Arkansas and Tennessee, appellant would have created a situation where it would have violated the above Tennessee statute, and would under the Arkansas statute have subjected itself to a fine of $100.00 to $500.00, and where it would be mandatory upon the Commissioner of Insurance of Arkansas to cancel appellant's rights to do business in that State.

Article 4, Section 1, of the Federal Constitution is as follows:

> "Section 1. Full faith and credit shall be given in each State to the *public acts*, records, and *judicial proceedings* of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

The Public Acts of Tennessee, Sec. 6132, expressly provides that appellant shall not discriminate between policyholders and the interpretation of the contract in this case by the Arkansas Supreme Court compels this Company to pay a claim in Arkansas that it is expressly forbidden to pay in Tennessee, both by the Tennessee and Arkansas anti-discrimination statutes, and in violation of both statutes to make the same identical contract with the same identical words mean one thing in Tennessee and another in Arkansas. Appellant had a vested right not only in this contract as construed under Tennessee law which it was compelled under the Tennessee anti-discrimination law to apply equally among insurants, but it also had a vested right in the said Arkansas anti-discrimination law, in that the Supreme Court of Arkansas could not constitutionally compel it to do a thing which under the Arkansas and Tennessee statutes, subjected it to severe fines, and made mandatory the cancellation of its right to do business in that State. Also the

decision in *Galbraith* v. *Ins. Co.*, 115 Tenn., 477, holding that under the language of this particular policy, it began to run anew from the *date of the reinstatement*, constitutes a judicial proceeding, which *became a part of the contract itself*, as has been before stated. Accordingly, the Supreme Court of Arkansas did not follow either the Public Acts or the judicial proceedings of the State of Tennessee in this matter, nor give "full faith and credit" to either.

Point D

The judgment of the Supreme Court of Arkansas in this case compels the appellant to pay a judgment which under like circumstances could not be rendered for or paid to a citizen of Tennessee, constituting an unlawful discrimination under Section 6132 of the Code of Tennessee for 1932, and Section 322 of the Digest of Insurance Laws of Arkansas, being Section 10 of Act 493 of 1921, subjecting appellant to the penalties of the statutes of both States, which impose fines and the penalty of cancellation of its license and a refusal to renew its license under such circumstances, and such judgment is unconstitutional under the Due Process Clause of the Fourteenth Amendment as taking property without due process of law.

Section 6100 of the Tennessee Code of 1932 expressly provides that the license of a domestic insurance company may be revoked where it violates the law or does not comply with the law, and Section 5958 of the Arkansas Code is substantially the same.

Accordingly, the judgment in this case, compelling the appellant to pay a citizen of Arkansas the claim under this policy when under the same state of facts a citizen of the State of Tennessee could not be paid, compels appellant to

violate both the anti-discrimination statutes of Tennessee and of Arkansas.

Insurance companies are under the absolute control of two independent State agencies, both of whom they must obey:

1. The Insurance Commissioner of each State, who under the above Section is vested with the summary power to cancel licenses and to refuse to renew licenses; and,

2. The Courts, under whose execution the property of the Company may be taken.

If the Insurance Commissioner of Tennessee should cancel the license of appellant or attempt to cancel its license because, under the judgment in this case, it had discriminated against a Tennessee policyholder in favor of an Arkansas policyholder of the same class by paying a citizen of Arkansas a claim that could not be paid to a citizen of Tennessee, it would be no defense that this Company acted under the compulsion of a judgment of the Supreme Court of Arkansas.

Accordingly, the situation is that this judgment compels appellant to violate both the Tennessee and Arkansas anti-discrimination statutes, and we submit that any judgment of any Court that requires a litigant to violate the statutes expressly made in such cases, is unconstitutional under the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

It is earnestly insisted by appellant, Life & Casualty Insurance Company of Tennessee, that the decree and judgment of the Supreme Court of Arkansas sustaining the validity of Section 6155 of Crawford & Moses' Digest of the

Statutes of Arkansas, as applied to the facts of this case, is erroneous and that said Act and the judgment herein is repugnant to the respective clauses of the Federal Constitution as hereinbefore set out.

We, therefore, respectfully ask that the judgment of the said Arkansas Supreme Court be reversed and judgment entered here for the appellant, Life & Casualty Insurance Company of Tennessee, so as to correct such errors.

Dated this 19th day of October, 1933.

Respectfully submitted,

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